WISCONSIN SUPREME COURT CALENDAR
AND CASE SYNOPSES
OCTOBER, 2011

IMPORTANT NOTICE: As part of the Supreme Court's Justice on Wheels program, Oct. 5 oral arguments will be held at the Carl Frederick Administration Building/Columbia County Courthouse, Branch III (2nd Floor) 400 DeWitt Street, in Portage, Wis.

This calendar includes cases that originated in the following counties:
Dane
Eau Claire
Monroe
Oneida
Outagamie
Racine
Waukesha
Winnebago
Wood

WEDNESDAY, OCTOBER 5, 2011 [PORTAGE]

9:30 a.m.	09AP1505-CR	-	State v. Harry Thompson
11:00 a.m.	09AP2768	-	Joel Hirschhorn v. Auto-Owners Insurance Company
02:00 p.m.	10AP1113-CR	-	State v. Jason E. Goss

THURSDAY, OCTOBER 6, 2011 [MADISON]

9:45 a.m.	10AP387-CR	-	State v. Gregory K. Nielsen
10:45 a.m.	09AP2385	-	Todd Olson v. Robert Farrar
1:30 p.m.	10AP177	-	Suzanne R. May v. Michael T. May

FRIDAY, OCTOBER 7, 2011 [MADISON]

9:45 a.m.	09AP3029	-	Crown Castle USA, Inc. v. Orion Logistics, LLC
10:45 a.m.	09AP2795	-	Jaymie A. Gister v. American Family Mutual Ins. Co.
1:30 p.m.	09AP2057-CR	-	State v. David W. Stevens

TUESDAY, OCTOBER 18, 2011 [MADISON]

9:15 a.m.	09AP2907-CR	-	State v. Joseph J. Spaeth

The Supreme Court calendar may change between the time you receive this synopsis and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT [PORTAGE]
WEDNESDAY, OCT. 5, 2011
9:30 A.M.

09AP1505-CR State v. Harry Thompson

This is a review of a decision of the Wisconsin Court of Appeals, District IV, which reversed an order of the Wood County Circuit Court, Judge Edward F. Zappen Jr. presiding.

This case centers on whether a defendant in a criminal case must be informed prior to trial that s/he faces a substantial mandatory minimum prison sentence if convicted.

Here is the background: In 2007, Harry Thompson was charged with sexually assaulting a nine-year-old girl. The district attorney alleged that Thompson had inserted a finger into the girl's genitals on two occasions. Thompson was charged with two counts of First Degree Sexual Assault of a Child Under Age 13 Without Great Bodily Harm.

Although the criminal complaint indicated that he faced a possible maximum term of 60 years in prison on each count, it did not state that he also faced a mandatory minimum imprisonment of 25 years on each count. The prosecutor acknowledged that he had been unaware of the mandatory minimum sentence. Thompson's attorney was himself unaware, and so did not inform Thompson.

Thompson pleaded not guilty. A jury found him guilty on one count and not guilty on the other. As the judge prepared for sentencing, he noticed the mandatory minimum 25-year prison sentence. He informed both the defense and the prosecution, and the defense made a motion for a new trial, arguing that Thompson's due process rights were violated because he was misinformed about the minimum penalty he faced when he chose to go to trial.

The court granted the motion for a new trial after concluding that the lack of information deprived Thompson of the opportunity to make a meaningful decision about perhaps accepting a plea agreement. "The prejudice is absolutely enormous," the judge said. "It is throw the dice at the trial or make an intelligent decision to try to negotiate." Thompson's attorney expands upon this in his petition to the Supreme Court:

> The trial court was alluding to the decision every criminal defendant must make: whether to accept a plea bargain offer or go to trial. The analysis is largely a cost-benefit analysis. The defendant weighs the probability of prevailing at a trial by jury and its inherent risk of more severe penalties if losing the jury trial, with the plea bargain offered. The greater the penalties the defendant faces when losing at trial, the more likely a defendant is to accept, or at least pursue, a plea bargain offer.

Before a new trial could take place, the State appealed. The Court of Appeals concluded that defendants do not have a due process right to information that might help them decide whether to take a plea agreement. The Court of Appeals also, on its own, raised the issue of inadequate assistance of counsel and concluded that Thompson could not make a case that his attorney had failed to adequately represent him.

Now Thompson has taken his case to the Supreme Court, where he argues (1) that his due process rights were violated when he was not informed of the mandatory minimum sentence prior to trial; (2) that the criminal complaint was defective because it did not spell out the mandatory minimum; and (3) that the Court of Appeals was wrong to raise the 'inadequate assistance of counsel' issue on its own at this juncture. Inadequate assistance claims are normally raised after sentencing, rather than in the middle of a case. The Supreme Court will decide if Thompson is to receive a new trial.

WISCONSIN SUPREME COURT [PORTAGE]
WEDNESDAY, OCT. 5, 2011
11:00 A.M.

09AP2768 Joel Hirschhorn v. Auto-Owners Insurance Co.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed an order of the Oneida County Circuit Court, Judge Mark Mangerson presiding.

This case calls upon the Wisconsin Supreme Court to decide if bat urine and droppings ("guano"), and the associated smell, fit the definition of "pollutant" for purposes of determining whether homeowner's insurance will cover losses related to an accumulation of bat excrement. The problem ultimately led the homeowners to demolish the home.

The circuit court concluded that the homeowners were not entitled to insurance coverage, but the Court of Appeals reversed this ruling.

Here is the background: Joel and Evelyn Hirschhorn owned a vacation home in Lake Tomahawk, Oneida County. In May 2007, they put the house up for sale. The real estate broker noticed bat guano and bats at the house, and attempted to clean it and remove the bats, but when the couple stayed in the home in August 2007, they noticed a persistent, offensive odor. They hired a contractor who determined that the smell was coming from an accumulation of bat urine and excrement between the siding and the walls of the home. The contractor could not guarantee that cleaning up the mess would rid the home of the odor, and ultimately the couple decided to demolish the house.

The Hirschhorns filed a claim with their insurer, Auto-Owners Insurance Company. The insurance policy excluded coverage for a number of items, including:

> [L]oss resulting directly or indirectly from: . . . discharge, release, escape, seepage, migration or disbursal of pollutants. . .[Defined as] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalized, chemicals, liquids, gases and waste. Waste includes material to be recycled, reconditioned or reclaimed.

Auto-Owners denied the claim on the basis that the accumulation of bat guano was not sudden or accidental, but instead the effect of a lack proper maintenance of the home. Auto-Owners later said it was also denying the claim because the policy excludes coverage for damage caused by pollution.

The matter went to court, and the trial court initially sided with the homeowner, concluding that bat guano does not constitute pollution as defined in the policy exclusion. Then, on a motion for reconsideration, the judge agreed with Auto-Owners that animal excrement is waste, and therefore is a pollutant. The homeowner appealed and the Court of Appeals reversed the circuit court, ruling that bat guano is not pollution, and that therefore Auto-Owners must provide coverage. The Court of Appeals likened bat guano to waste from biological processes such as exhaled carbon dioxide.

Now, Auto-Owners has come to the Supreme Court, which is expected to clarify whether bat guano is considered pollution for purposes of insurance coverage. The Court's decision in this matter is expected to have far-reaching effects, as most homeowner's insurance policies carry the standard pollution exclusion.

WISCONSIN SUPREME COURT [PORTAGE]
WEDNESDAY, OCT. 5, 2011
2:00 P.M.

10AP1113-CR State v. Jason E. Goss

This is a review of a decision of the Wisconsin Court of Appeals, District III (District IV judges presiding), which affirmed a ruling of the Eau Claire County Circuit Court, Judge Lisa K. Stark presiding.

This case asks the following question: Does the mere odor of intoxicants give police probable cause to request that a driver submit to a breath test in a situation where the motorist is a non-commercial driver who has been convicted of OWI four times prior? The Court of Appeals said "yes." The Wisconsin Supreme Court in the past has said "no," but that case involved a driver without prior OWI convictions.

Here is the background: On an October evening in 2008, an Eau Claire police officer stopped a car because he had difficulty reading the dirty, poorly lit license plate. The driver, Jason Goss, admitted that he was driving with a revoked license. He also told the officer he was on probation. The officer radioed in to check on Goss, and then arrested him and placed him in the squad car. While he was buckling Goss in, the officer smelled liquor. He asked Goss if he'd been drinking; Goss said he'd had two beers. The officer gave Goss a breath test, and the results were 0.084. The officer then had Goss perform a field sobriety test, and ultimately took him to the hospital for a blood test, which registered .08. This is the legal limit for a person who has not previously been convicted of OWI; however, the limit is lower (0.02) for a person with prior convictions.

Goss ultimately pleaded guilty to drunk driving as a fifth offense, after the trial court rejected his argument that the arrest was not legal. He was convicted, given a suspended sentence and placed on probation for three years. He appealed.

On appeal, Goss argued that the odor of intoxicants, on its own, does not give police sufficient grounds to request a breath test.[1] The Court of Appeals affirmed his conviction, concluding that, taken together, all the circumstances – the four prior convictions (which the arresting officer was aware would lower Goss' legal limit to .02), the fact that Goss was on probation, and 'no alcohol' is normally a rule of probation, and the fact that he smelled of intoxicants – gave the officer probable cause to believe Goss was violating the law and to pursue testing.

Now Goss has come to the Supreme Court, which is expected to clarify the probable cause requirement in situations involving a multiple-time OWI offender who smells of intoxicants.

[1] The Wisconsin Supreme Court articulated this in *County of Jefferson v. Renz*, 231 Wis.2d 283, 603 N.W.2d 541 (1999) – but Renz involved a driver who had no prior OWI convictions

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 6, 2011
9:45 a.m.

2010AP387-CR State v. Nielsen

This is a review of a District II Court of Appeals (headquartered in Waukesha) order that imposed a sanction on the State Public Defender. In the underlying case, the Court of Appeals affirmed a Racine County Circuit Court decision, Judge Faye M. Flancher presiding.

In this case, the Supreme Court reviews a challenge to a Court of Appeals order summarily imposing a $150 sanction against an assistant state public defender (SPD). The Court of Appeals imposed the sanction against the SPD for allegedly filing a false certification regarding an appendix to an appellate brief and for omitting what the court considered essential record documents from the appendix.

The SPD asks the Supreme Court to decide if the sanctions violate due process and if they impermissibly circumvent or supplant Supreme Court Rules established for deciding ethics issues through the Office of Lawyer Regulation. In addition, the SPD asks if rule Wis. Stat. Rule 809.19(2) Appendix, is unconstitutionally vague on its face or as applied for purposes of imposing monetary sanctions.

Some background: The SPD was appointed to provide post-conviction representation in State v. Gregory K. Nielsen, a case involving homicide by intoxicated use of a motor vehicle from Racine County.

The SPD attorney filed a post-conviction motion alleging that the circuit court erred when it failed to explain the rationale for the sentence it imposed, when it failed to explain why it rejected the sentence recommended in the presentence report, and by imposing a sentence that was excessive.

SPD counsel filed an appeal from the judgment of conviction and from the order denying post-conviction relief. The Court of Appeals summarily affirmed the judgment of conviction.

The appeal raised a single issue: that the circuit court failed to fulfill the mandate articulated in State v. Gallion, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, to explain the rationale for the particular sentence imposed. In the appendix to the brief, the SPD attorney provided, among other things, photocopies of the three transcript pages in which the trial court announced the factors it was considering in pronouncing sentence.

The portion of the order that resulted in the petition for review noted that "the appellant's appendix includes only a select portion of the sentencing court's pronouncement and excludes that portion where the court discussed these aspects of Nielsen's character…"

The appellant's brief certified that the appendix contains the portions of the record essential to an understanding of the issues raised. The Court of Appeals imposed the sanction, concluding that omission of the entirety of [the] sentencing court's remarks, and that the certification was false. The court said the false certification and omission of essential record documents in the appendix places an unwarranted burden on the court and is grounds for imposition of a penalty. State v. Bons, 2007 WI App 124, ¶25, 301 Wis. 2d 227, 731 N.W.2d 376; see also Rule 809.83(2).

The SPD says the Court of Appeals has been imposing summary sanctions in this manner with increasing frequency. It says a Lexis search shows at least 23 cases where appendix and false

certification sanctions have been imposed in a similar manner since the Court of Appeals declared it could do so in Bons. It says at least 17 such cases occurred in the last calendar year and this number under-reports the actual total because legal research tools such as Lexis do not include cases like this one that were resolved by summary order.

The SPD argues that the Court of Appeals' practice of imposing monetary sanctions summarily in written decisions, for what the court deems to be violations of court rules regarding appendices in appellants' briefs, violates due process because the sanctions are ordered without notice or an opportunity to be heard.

The SPD argues that declaring a certification "false" when the court's subjective view of what is essential in regard to the subjective appendix content rule does not match the attorney's subjective view, is a false equivalency and is based on an erroneous reading of the certification rule.

The Court of Appeals says although the SPD challenges the appendix content rule, it effectively seeks review of the appellate rule addressing non-compliance with procedural rules, Rule 809.83(2). The Court of Appeals says any modification of the process required to impose costs presumably should affect not only those cases where the Court of Appeals finds an appendix rule violation, but also cases where either the Supreme Court or the Court of Appeals finds any procedural rule violation. The Court of Appeals says both the appendix rule and the costs rule substantially affect the work of the Court of Appeals because it is primarily an error-correcting court and processes more than 3,000 appeals each year.

The Court of Appeals says given this material shortcoming in the appendix, it was reasonable to conclude that counsel violated Rule 809.19(2)(a) and sanctioned counsel and imposed a modest fine. The Court of Appeals says the imposition of costs is directly in line with other instances of appendix rule non-compliance, including Bons, and it says this conformity demonstrates that a reasonable judge could and in fact has imposed similar costs.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 6, 2011
10:45 a.m.

2009AP2385 Olson v. Farrar

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Monroe County Circuit Court decision, Judge Todd L. Ziegler, presiding.

This case examines the proper scope of review for a court to determine an insurance company's duties to defend and indemnify under a personal liability policy that generally excludes coverage for property damage resulting from a motorized vehicle.

Some background: Todd Olson alleges that without his permission, Robert Farrar used Farrar's farm tractor to pull Olson's mobile trailer home about eight miles. The tractor was not powerful enough to pull the trailer home up a hill. The trailer rolled back, colliding with Olson's truck, which was following the trailer home.

Olson sought compensation from Farrar for property damage to both the mobile trailer home and his truck. Upon receiving notice of this claim, Farrar's insurer, Mt. Morris Mutual Insurance Co., provided Farrar a defense, reserved its rights pending a court determination on its duties to defend and indemnify. Mt. Morris also moved to intervene, bifurcate issues of coverage from liability and to stay proceedings on the merits until the trial court made a determination on coverage.

The policy provided Farrar with personal liability coverage for "property damage but specifically excluded from coverage property damage which results from the ownership, operation, maintenance, use .. of 'motorized vehicles' owned or operated by ... an insured." An exception to the exclusion provided that Mt. Morris would pay for damages in the event that coverage was provided by an incidental motorized vehicle or watercraft coverage.

After the trial court granted Mt. Morris' motions, Mt. Morris moved for summary judgment, requesting the trial court find that it owed no duty to defend Farrar nor did it owe a duty of indemnity for the alleged damages. The trial court granted summary judgment, concluding there was no coverage under the policy because any property damage resulted from Farrar's tractor, not the mobile home. Farrar appealed, and the Court of Appeals reversed and remanded.

The Court of Appeals noted that summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Prior to reaching the question of whether coverage for the accident existed under the policy, the Court of Appeals clarified the scope of its review. It disagreed with both Farrar and Mt. Morris that review was limited to the allegations set forth within the four corners of the complaint and the provisions of the policy.

The court went on to say that when an insurer has not refused to provide a defense prior to a determination of coverage and the question is not whether the insurer has an initial duty to defend but rather whether coverage is provided under the policy in question, then the court's review is not limited by the four corners rule.

The Court of Appeals said prior to a determination of coverage, an insurer may be required to furnish a free defense to its insured, and the refusal to do so may be a breach of the duty to defend. It said, however, after a court determines that coverage does not exist under a policy, the insurer is no longer under an obligation to provide a defense and may dispute the issue of coverage without breaching its initial duty to defend by, among other things, seeking a bifurcated trial in which the circuit court

decides the issue of coverage in an action separate from the action on the merits of the complaint. Baumann v. Elliott, 286 Wis. 2d 667, ¶8. (Ct. Appl. 2005). The Court of Appeals said in this case, Mt. Morris sought bifurcation and then sought summary judgment on the coverage issue. Therefore, it said it was beyond the initial duty to defend stage of the proceedings and was not constrained by the four corners rule.

The Court of Appeals said in order for there to be coverage in this case, the damage must have resulted from a mobile home trailer; the trailer must not have been towed by or attached to a motor vehicle; and the property damaged must not have been occupied by, used by, or in the care of Farrar.

Farrar argued that the policy provided coverage because the property damage to the mobile home and truck resulted from a mobile home trailer. Mt. Morris argued neither the damage to the mobile home nor the truck resulted from the mobile home trailer but rather the damage resulted from Farrar's tractor.

Resolving the ambiguity in favor of coverage, the Court of Appeals concluded that the damage in this case "resulted from" the mobile home trailer.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 6, 2011
1:30 p.m.

2010AP177 May v. May

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Dane County Circuit Court, Judge Maryann Sumi, presiding.

This certification asks the Supreme Court to review whether a divorcing parties' agreement to an unmodifiable child support floor for 33 months violates public policy. A decision could resolve a possible conflict in previous Court of Appeals and Supreme Court decisions.

Some background: Michael and Suzanne May were divorced in 2005 in Illinois after nine years of marriage. They share legal custody and physical placement of their two children. At the time of the divorce, Michael had recently lost his job. Pursuant to the divorce judgment and marital settlement agreement, Michael was to pay child support of $481.48 monthly, with child support to be recalculated when he became reemployed.

After both parties and their children moved to Wisconsin, both parties filed various post-judgment motions. On Jan. 7, 2008, the Dane County circuit court entered a stipulated order providing that Michael would pay child support of $1,203 per month. The parties stipulated that this "shall be the minimum amount due for a period of no less than 33 (thirty-three) months . . . and Michael may not file for a reduction in that amount for the full 33-month period."

Seventeen months later, in June of 2009, Michael moved for a reduction in the payment amount due to an alleged involuntary loss of his employment. Suzanne opposed the motion. The circuit court held that the 33-month floor in the stipulation was not against public policy and was otherwise enforceable. Michael appealed.

In its certification memorandum, District IV Court of Appeals says this case is not about "ceiling" stipulations, which the Supreme Court has held are unenforceable. See Frisch v. Henrichs, 2007 WI 102, ¶74 n.23, 304 Wis. 2d 1, 736 N.W.2d 85.

The Court of Appeals says the question of whether parties may stipulate to a floor below which the amount of support may not go has not squarely been presented to the Supreme Court. District IV notes that in a footnote in Frisch, this court said, "Stipulating to a minimum amount for a limited period of time does not violate public policy because it ensures that a certain amount of child support is received, which is in the best interests of the children." Frisch, ¶74 n.23.

District IV notes that the Court of Appeals has published a number of opinions which considered stipulations that set a floor on the amount of support. Only one of those decisions was issued after Frisch.

In Jalovec v. Jalovec, 2007 WI App 206, 305 Wis. 2d 467, 739 N.W.2d 834, the Court of Appeals held that a stipulation setting a four-year floor on child support was against public policy. District IV says Jalovec appears to be inconsistent with this court's footnote in Frisch, which made the blanket statement that a child support floor of limited duration is not against public policy.

A decision by the Supreme Court is expected to develop and clarify the law on the enforceability of child support stipulations that set a child support payment amount and then restrict the payor's right to request downward adjustments.

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 7, 2011
9:45 a.m.

2009AP3029 Crown Castle v. Orion

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Outagamie County Circuit Court decision, Judge Dee R. Dyer, presiding.

This case examines whether circuit courts and court commissioners have authority to expand the scope of a supplemental examination to require a third-party company, sharing common ownership with a judgment debtor, to submit to a supplemental examination under Wis. Stat. § 816.03.

Some background: Crown Castle obtained a default judgment in Pennsylvania against Orion Construction, a Wisconsin company whose sole member is Douglas Larson. Crown Castle then filed this action in Wisconsin to execute the foreign judgment.

Orion Construction is the sole judgment debtor. The default judgment was based on Crown Castle's claim that Orion Construction performed defective structural reinforcement work to cellular towers in Chicago.

Following entry of default judgment against Orion Construction, the circuit court commissioner ordered Orion Construction to provide Crown Castle with all records pertaining to Orion Construction's assets and financial affairs.

A letter from Orion Construction's attorney advised that there were no separate tax returns for Orion Construction, because it was a single member LLC, and provided Larson's personal tax returns from 2005-07, and an accounting spreadsheet indicating a $210,831 account receivable from Crown Castle.

Crown Castle believed that Larson was concealing Orion Construction's assets, and sought to examine the books and records of Orion Logistics. The circuit court commissioner expanded the order to include Orion Logistics.

Orion Logistics appealed the order. It argued that the circuit court erroneously exercised its discretion to order Orion Logistics to submit to a supplemental examination. The Court of Appeals noted it would affirm the circuit court if it considered the relevant facts, the proper legal standard, and used a demonstrated rational process to arrive at a reasonable conclusion.

The Court of Appeals said that Larson's tax returns indicate that he had complete ownership and control over both Orion Construction and Orion Logistics. It concluded that the rationale of Courtyard Condo. Ass'n, Inc. v. Draper, 2001 WI App 115, ¶13, 244 Wis. 2d 153, 629 N.W.2d 38, would permit the court commissioner and circuit court to order a third-party company under common ownership with a judgment debtor to produce its books and disclose its finances.

The Court of Appeals said that Larson's tax returns indicate that Orion Construction generated only $187,680 in gross receipts in 2007 after generating millions in sales in 2005 and 2006. Conversely, Orion Logistics' only return indicated it generated over $15 million in gross receipts in 2007. The Court of Appeals said based on this evidence, the circuit court properly concluded that the proposed discovery may lead to relevant evidence in the collection of the judgment against Orion Construction.

Orion argues that nowhere in Wis. Stat. § 816.03 does the circuit court or court commissioner have the authority or discretion to subject it as a non-party to the underlying lawsuit, to supplementary

proceedings. It argues the plain language of the statutes is limited to a "judgment debtor" concerning the "judgment debtor's property."

Crown Castle asserts that over a century ago, the court has made it clear the circuit court has broad discretion in determining the scope of a supplemental examination. Crown Castle says that for the last decade, Wisconsin courts have had no problem interpreting and applying § 816.03 to answer the question in the negative, without having to overrule Courtyard Condo.

Crown Castle contends the policy reasons behind the circuit court's discretion could not be more clear: "Unless a comprehensive and searching examination be allowed, an artful debtor might defeat the discovery sought."

WISCONSIN SUPREME COURT
FRIDAY, OCTOBER 7, 2011
10:45 a.m.

2009AP2795 Gister v. Amer. Fam. Mut. Ins. Co.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge Patrick J. Fiedler, presiding.

This case examines whether a charitable hospital that must provide emergency medical services to the uninsured may enforce a hospital lien pursuant to Wis. Stat. § 779.80 on a Medicaid recipient's personal injury settlement as an alternative to billing Medicaid.

Some background: Jaymie Gister, Ethan Gister, and Jared Ellis (collectively, "the Gisters"), were injured in an automobile accident caused by an insured of American Family Insurance.

The Gisters, who were covered by "BadgerCare" (medical assistance), were treated at Saint Joseph's Hospital in Sheboygan. They alleged in a complaint that Saint Joseph's did not submit the medical bills to medical assistance, but instead filed a hospital lien against each of them for recovery of the medical bills. They also claimed that the insurance policy limits are insufficient to cover their damages, and that American Family is now prepared to settle their injury claims. but any such payments to the Gisters would be reduced or eliminated to pay the hospital, if the liens are valid.

The circuit court ruled in favor of Saint Joseph's and held the liens valid. The circuit court concluded that under federal and state regulations, Saint Joseph's has no obligation to submit the plaintiff's hospital bills to the medical assistance program for payment. Further, the circuit court concluded that Saint Joseph's Hospital liens do not impose direct charges against the Gisters in violation of Wis. Stat. § 49.49 (3m). The circuit court concluded Wisconsin law specifically grants Saint Joseph's Hospital the authority to impose a lien against settlement proceeds received by plaintiffs under circumstances presented here.

The Court of Appeals disagreed, relying on Dorr v. Sacred Heart Hospital, 228 Wis. 2d 425, 597 N.W.2d 462 (Ct. App. 1999). Dorr held that when the contract between an HMO and hospital contains a hold harmless provision, no hospital lien can be filed against an HMO's patient's property because the HMO patient is not indebted to the hospital for the medical services provided.

Saint Joseph's says the Court of Appeals' decision contravenes Congress's stated intent that Medicaid shall be the payer of last resort, and that participating states shall ensure that federal and state funds are not misspent for covered services to eligible Medicaid recipients when third parties are legally liable. See Wesley Health Care Center, Inc. v. DeBuono, 244 F.3d 280, 281 (2nd Cir. 2001).

Saint Joseph's contends the circuit court correctly concluded that Dorr does not apply because well-established law permits hospitals to either bill Medicaid or file a lien on any proceeds that may be received by plaintiffs against third-party tortfeasors. The hospital argues that debt does exist for which Medicaid benefits are not authorized because the otherwise eligible recipients have a means to pay the bills through the settlement proceeds.

The plaintiffs argue Saint Joseph's is really seeking a ruling to make the right of a hospital to be reimbursed at full value for the services it provides paramount to the rights of an injured party and the right of the state to be reimbursed out of a third-party settlement. It argues there still remains a subrogation interest to the medical assistance program in the amount of $7,440.91 that remains unpaid and would go unreimbursed if the court accepts Saint Joseph's interpretation of the lien statute.

WISCONSIN SUPREME COURT
FRIDA, OCTOBER 7, 2011
9:15 a.m.

2009AP2057-CR State v. Stevens

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Waukesha County Circuit Court decision, Judge Robert G. Mawdsley, presiding.

This case examines Miranda rights when a suspect in a child sexual assault case invoked his right to counsel and then initiated further discussion with police. However, before he formally waived his rights and gave an additional statement, his attorney appeared at the station asking to speak with him, at the request of the suspect's mother. The attorney was turned away.

Some background: David W. Stevens, a registered sex offender, was arrested at an apartment complex after a nine-year-old girl alleged he had physical contact with her in the apartment complex swimming pool.

In the first interview with police, Stevens was read his Miranda rights, which he waived. See Miranda v. Arizona, 384 U.S. 436 (1966). Stevens made certain admissions. Stevens then stated he wanted to speak to his lawyer. There is no dispute the detective then terminated the interview, at 10:35 a.m. The admissibility of these initial statements is not challenged.

The detective then took Stevens back to his cell, which was estimated to take approximately twenty or thirty seconds. Stevens told the detective he changed his mind and wanted to waive his right to counsel and continue speaking with the detective. The detective declined because Stevens had invoked his right to counsel.

At Steven's request, the detective agreed to speak with him later. Before interviewing Stevens again, a detective again read Stevens his Miranda rights and Stevens waived his right to counsel. Stevens admitted he had intentional contact.

Before trial, Stevens moved to suppress the statements from his second interview, claiming (1) he invoked his right to counsel during the first interview; (2) the detectives did not tell him counsel had appeared at the station to speak with him; (3) one detective did not tell the other detective that a lawyer had requested to speak with Stevens; and (4) one of the detectives did not listen to a voicemail left by the attorney before interviewing Stevens a second time.

The circuit court concluded, Stevens did not knowingly waive his right to counsel before the second interview because he did not know counsel had appeared at the station to see him. The Court of Appeals reversed. Stevens asks the Supreme Court to review if police violated the demands of Miranda by denying an attorney access to the suspect prior to the second waiver of his Miranda rights.

Stevens also asks the Supreme Court if its decision in Blum v. 1st Auto & Cas. Ins. Co., 2010 WI 78, 326 Wis. 2d 729, 786 N.W.2d 78, mean that the Court of Appeals' decision in State v. Middleton, 135 Wis. 2d 297, 399 N.W.2d 917 (Ct. App. 1986) has no precedential value whatsoever because that case was overruled in State v. Anson, 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776?

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 18, 2011
9:15 a.m.

2009AP2907-CR State v. Spaeth

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Winnebago County Circuit Court, Judge William H. Carver, presiding.

In this certification, the Supreme Court examines whether compelled incriminating statements made to a probation agent as part of a standard requirement of probation may be considered a "legitimate source wholly independent of compelled testimony" under Kastigar v. United States, 406 U.S. 441 (1972). In that case, the U.S. Supreme Court held that the government may compel incriminating testimony so long as it comes with a grant of use and derivative use immunity.

Some background: Defendant Joseph Spaeth, a convicted sex offender, was on extended supervision in 2006 with the standard condition that he must comply with polygraph examinations as requested by his probation agent.

Failure to comply with testing would have been grounds to revoke his extended supervision.

On Feb. 15, 2006, the defendant's probation agent ordered a routine polygraph test. After the test, while the agent and examiner were discussing the results, the defendant disclosed to his agent that he had been "horse playing" with his nieces and nephews, who were children. His statements indicated a clear violation of his rules of extended supervision, so his agent called police to take him into custody on a probation hold. After police were called, the defendant admitted to his agent that he had been tickling his nieces and nephews and may have brushed their genital and chest areas.

Police went to where the defendant had been meeting with his probation agent, handcuffed him, and put him in the back of a squad car. While the defendant was present, his agent told police about statements the defendant had made to her. The defendant was taken to the police station, where he was given his his Miranda warnings.

The defendant told police essentially the same thing he had told his agent. He also said he knew he had a problem and that his actions were wrong. Based on the defendant's written and oral statements to police, a criminal complaint was filed charging him with four counts of sexual assault of a child as a persistent repeater. After a failed motion to suppress, a jury convicted him of all four charges. He was sentenced to life in prison without possibility of parole.

In October of 2008, the circuit court granted a post-conviction motion for a new trial on the ground that extraneous, prejudicial information had affected jury deliberations. (It was discovered that one of the jurors had recognized the defendant's address as the address of a registered sex offender and shared that information with the other members of the jury). The defendant later pled no contest to an amended information charging him with four counts of child enticement. He was sentenced to five years of initial confinement and ten years of extended supervision and appealed.

On appeal, the defendant argues that his statement to police should have been suppressed under the Fifth Amendment to the U.S. Constitution and Article I, § 8 of the Wisconsin constitution. The

defendant argues that his statement was a mere extension of compelled statements he made to his probation agent and thus must be suppressed because it too was compelled.

The District II Court of Appeals says because the defendant's statements before speaking to police were compelled, the statement he made to police is only admissible if there was a sufficient break from the compelled statements and if the statement to police was not "derived from" the compelled statements

The Court of Appeals points out that under Wis. Admin Code § DOC 328.04(2)(w), the defendant's probation agent was required to report all violations of the criminal law by clients to a supervisor or appropriate law enforcement authority. Therefore, the Court of Appeals says once the defendant was compelled to give his incriminating statements to the polygraph examiner and to his probation agent, the agent had a legal obligation to report the statements to police.

The Court of Appeals concludes by saying this area of law is in need of clarification because the fact pattern here will likely recur and because of the tension between Kastigar and the needs and policies of the state Department of Corrections.